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Public Prosecutor v Chong Chieng Jen & Anor

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HIGH COURT (KUCHING) — CRIMINAL APPEAL NO KCH-42 AC-11/9 OF 2017
RAVINTHRAN PARAMAGURU J
6 APRIL 2018

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Constitutional Law — Fundamental liberties — Freedom of assembly — Peaceful Assembly Act 2012 ('the PAA') — Participants in a public assembly approved by the authorities met at one of four meeting points far from the venue and then walked towards the venue — Purpose of having meeting points was to avoid traffic congestion at assembly venue — Whether by walking in a mass march towards the venue the participants had taken part in a 'street protest' — Elements of the offence of taking part in a 'street protest' — Section 4(2)(c) of the PAA

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A non-governmental organisation ('BERSIH') was allowed by the authorities to hold a public assembly at a field ('the venue') in Kuching at 3pm on 29 August 2015. The organisers of the assembly had asked the public to gather at four points (one of which was the Hilton Hotel) around the city by 2pm before proceeding to the venue. By 1pm, a large crowd had gathered at the Hilton Hotel. The respondents, who were both Members of Parliament, were in the crowd. The police advised those gathered to move to the venue but the crowd only started moving when the number of people gathered had reached about 400. During the walk, the crowd at times encroached on the road. There were displays of BERSIH banners and shouts of political slogans. The assembly at the venue itself proceeded as scheduled without incident. Following the event, the respondents were charged in the sessions court with participating in a 'street protest', an offence under s 4(2)(c) of the Peaceful Assembly Act 2012 ('the PAA'). The prosecution's case was that regardless of the fact that the participants who had gathered at the Hilton Hotel intended to take part in the approved assembly at the venue, the procession of the people from the Hilton Hotel to the venue constituted a 'street protest' within the meaning of the PAA. At the end of the prosecution's case, the sessions court held that the procession did not constitute a 'street protest' and acquitted the respondents without calling for their defence. The court held, inter alia, that the purpose of having a gathering point, such as the one at the Hilton Hotel, was so that participants (as instructed by the assembly organisers) could park their vehicles far from the venue to avoid traffic congestion and that the intention of the gathered participants was to merely walk towards the approved venue to take part in the assembly and not to march for the purpose of objecting to or advancing any particular cause. The court also found that the participants had complied with the instructions of the organisers and the police personnel on duty at all times

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A and that the march itself was peaceful and uneventful. In the instant appeal, the appellant argued that since the prosecution had proven a prima facie case against the respondents, their defence to the charge should have been called. The appellant submitted that the trial court erred in regarding the march of the people from the Hilton Hotel to the venue as being part and parcel of the B approved assembly or the fact that the march itself was peaceful or uneventful. The respondents, on the other hand, reiterated that their gathering at the Hilton Hotel after parking their vehicles and then walking towards the venue were merely acts preparatory to their intention to attend the approved assembly at the venue and could not be viewed as a separate event altogether. Section 3 C of the PAA defined a 'street protest' as 'an open air assembly which begins with a meeting at a specified place and consists of walking in a mass march or rally for the purpose of objecting to or advancing a particular cause or causes'.

D **Held**, allowing the appeal, setting aside the order of acquittal and ordering the respondents to enter their defence to the charge before the sessions court:

(1) The prosecution had tendered credible evidence in respect of all the elements of the offence under s 4(2)(c) of the PAA and therefore the sessions court should have found that a prima facie case had been E established against the respondents (see para 43).

(2) In defining a 'street protest' under the PAA, Parliament did not provide that the dominant purpose or a secondary purpose of a mass march would negate the offence of street protest. In other words, the purpose of F objecting to or advancing a particular cause might co-exist with another purpose, which in this case was to access the approved assembly at the venue. Thus, if from the point of departure to the point of arrival, the intended walk had metamorphosed into a street protest as well, within the meaning of the PAA, it was no defence to say that the street protest G was not the dominant purpose or the original purpose of the march. Intention was a matter of inference and it was trite law that it could develop on the spot. Otherwise, Parliament's aim in creating the offence of street protest would be completely frustrated (see para 33).

(3) The sessions court should have considered whether the evidence H supported the elements of a street protest and whether the respondents had participated in it regardless of whether the participants had also wanted to access the venue. The answers of the police witnesses during cross-examination that there could not have been a street protest merely because the participants had obeyed their orders to walk to the venue I were not relevant. It was a legal question. Whether or not there was a street protest was a matter for the court to determine upon considering the elements of the offence and the evidence. Whether a mass march was peaceful or not was not relevant for the purpose of definition of a street protest (see paras 34, 40 & 42).

[Bahasa Malaysia summary

Organisasi bukan kerajaan ('BERSIH') dibenarkan oleh pihak berkuasa untuk mengadakan perhimpunan awam di padang ('tempat tersebut') di Kuching pada 3 petang pada 29 Ogos 2015. Penganjur perhimpunan telah meminta orang ramai untuk berkumpul di empat tempat (salah satunya adalah Hilton Hotel) di sekitar bandar sekitar 2 petang sebelum meneruskan ke tempat tersebut. Menjelang jam 1 petang, ramai orang telah berkumpul di Hotel Hilton. Responden-responden, yang kedua-duanya Ahli Parlimen, berada di khalayak ramai. Polis menasihati mereka yang berkumpul untuk berpindah ke tempat tersebut tetapi orang ramai hanya bergerak ketika bilangan orang berkumpul mencapai kira-kira 400. Semasa berjalan kaki, orang ramai pada masa-masa telah menceroboh ke jalan raya. Terdapat paparan banner BERSIH dan teriakan slogan politik. Perhimpunan di tempat tersebut diteruskan seperti yang dijadualkan tanpa insiden. Berikutan kejadian itu, responden-responden telah dituduh di mahkamah sesyen kerana menyertai 'bantahan jalanan', satu kesalahan di bawah s 4(2)(c) Akta Perhimpunan Aman 2012 ('APA'). Kes pendakwaan adalah tidak kira fakta bahawa peserta yang berkumpul di Hotel Hilton berniat untuk mengambil bahagian dalam perhimpunan yang diluluskan di tempat tersebut, perarakan orang dari Hotel Hilto ke tempat tersebut merupakan 'bantahan jalanan' dalam maksud APA. Di Akhir kes pendakwaan, mahkamah sesyen memutuskan bahawa perarakan itu bukan 'bantahan jalanan' dan teah melepaskan responden-responden tanpa memanggil pembelaan mereka. Mahkamah memutuskan, antara lain, bahawa tujuan mengadakan tempat berkumpu, sebagaimana di Hotel Hilton, adalah supaya peserta (sebagaimana diarahkan oleh penganjur perhimpunan) boleh meletakkan kenderaan mereka jauh dari tempat tersebut bagi mengelakkan kesesakan lalulintas dan babhawa niat peserta yang berkumpul itu adalah hanya untuk berjalan ke arah tempat yang diluluskan untuk mengambil bahagian dalam perhimpunan itu dan bukan untuk berarak bagi tujuan membantah atau mengemukakan apa-apa sebab tertentu. Mahkamah juga mendapati bahawa peserta telah mematuhi arahan penganjur dan pegawai polis yang bertugas pada setiap masa dan perarakan itu adalah secara aman dan tiada kejadian yang tidak diingini. Dalam rayuan ini, perayu berhujah oleh kerana pendakwaan telah membuktikan kes prima facie terhadap responden-responden, pembelaan mereka terhadap pertuduhan patut dipanggil. Perayu berhujah bahawa mahkamah perbicaraan terkhilaf berkenaan perarakan orang ramai dari Hotel Hilton ke tempat tersebut sebagai sebahagian daripada perhimpunan yang diluluskan atau hakikat yang perarakan itu sendiri adalah aman atau tiada kejadian tidak diingini. Responden-responden, sebaliknya, mengatakan semula bahawa mereka berkumpul di Hotel Hilton selepas meletak kenderaan mereka dan kemudian berjalan ke arah tempat tersebut sebagai perbuatan yang hanya bersifat persediaan kepada niat mereka untuk menghadiri perhimpunan yang diluluskan di tempat tersebut dan tidak patut langsung dilihat sebagai kejadian

A berasingan. Seksyen 3 APA mentafsirkan 'bantahan jalanan' sebagai 'an open air assembly which begins with a meeting at a specified place and consists of walking in a mass march or rally for the purpose of objecting to or advancing a particular cause or causes'.

B **Diputuskan**, membenarkan rayuan, mengetepikan perintah pelepasan dan memerintahkan responden-responden memasuki pembelaan mereka terhadap pertuduhan di hadapan mahkamah sesyen:

(1) Pendakwaan telah menenderkan keterangan yang boleh dipercayai
C berkaitan kesemua unsur-unsur kesalahan d bawah s 4(2)(c) APA dan oleh itu mahkamah sesyen patut mendapati bahawa suatu kes prima facie telah dibuktikan terhadap responden-responden (lihat perenggan 43).

(2) Dalam mentafsirkan 'bantahan jalanan' di bawah APA, Parliamen tidak
D memperuntukkan bahawa tujuan utama atau tujuan sekunder suatu perarakan beramai-ramai akan menafikan kesalahan bantahan jalanan. Dalam erti kata lain, tujuan untuk membantah atau mengemukakan suatu sebab tertentu mungkin wujud dengan tujuan lain, yang dalam hal ini adalah untuk mengakses perhimpunan yang diluluskan di tempat
E tersebut. Oleh itu, jika dari titik keberangkatan sampai ke titik ketibaan, perjalanan yang dimaksudkan telah diubah menjadi bantahan jalanan, dalam erti APA, tiada pembelaan untuk mengatakan bahawa bantahan jalanan bukanlah tujuan utama atau tujuan asal perarakan itu. Niat adalah suatu perkara inferens dan ia adalah undang-undang lapuk
F bahawa ia boleh dibuat pada masa itu juga. Jika tidak, matlamat Parlimen untuk mencipta kesalahan bantahan jalanan akan gagal (lihat perenggan 33).

(3) Mahkamah sesyen sepatutnya mempertimbangkan sama ada keterangan
G itu menyokong unsur-unsur bantahan jalanan dan sama ada responden telah mengambil bahagian di dalamnya tanpa mengira sama ada peserta juga ingin mengakses tempat tersebut. Jawapan dari saksi polis semasa pemeriksaan balas bahawa tidak ada bantahan jalanan semata-mata kerana para peserta telah mematuhi arahan mereka untuk berjalan ke
H tempat itu tidak relevan. Ia adalah persoalan undang-undang. Sama ada atau tidak ada bantahan jalanan adalah perkara yang perlu diputuskan oleh mahkamah apabila menimbangkan unsur kesalahan dan keterangannya. Sama ada perarakan besar-besaran adalah aman atau tidak adalah tidak relevan bagi tujuan tafsiran bantahan jalanan (lihat
I perenggan 34, 40 & 42).]

Notes

For cases on freedom of assembly, see 3(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 2841–2842.

Legislation referred to

Peaceful Assembly Act 2012 ss 2, 3, 4, 4(1), (2), (2)(c), (3), 7(b), 21

Kamal Baharin bin Omar (Hayda Faridzal bin Abu Hassan and Haresh Prakash with him) (Deputy Public Prosecutor, Attorney General's Chambers of Sarawak) for the appellant.

Chong Siew Chiang (Gobind Singh Deo, Michael Kong, Tan Kee Heng and Roger Chin with him) (Chong Brothers) for the respondents.

Ravinthran Paramaguru J:

INTRODUCTION

[1] The respondents were charged in the sessions court with the offence of participating in a 'street protest'. It is an offence under s 4(2)(c) of the Peaceful Assembly Act 2012 ('the PAA 2012') and it is punishable under s 4(3) of the same Act. The prosecution called a total of seven witnesses. At the conclusion of the case for the prosecution, the learned sessions court judge acquitted the respondents without calling for their defence. The prosecution has appealed this decision before this court.

[2] For ease of reference, before proceeding further, I shall set out the charge below:

> Bahawa kamu bersama beberapa orang yang masih bebas, pada 29 Ogos 2015 di antara lebih kurang jam 2.00 petang hingga 3.00 petang bermula dari hadapan Hotel Hilton Kuching, Jalan Borneo melalui Jalan Tunku Abdul Rahman, Jalan Tabuan, Jalam Ban Hock sehingga ke padang Song Kheng Hai, di dalam Bandaraya Kuching, di dalam Negeri Sarawak, telah menyertai suatu protes jalanan bagi maksud memajukan suatu tujuan berkaitan Perhimpunan Bersih 4 anjuran gabungan Pilihanraya Bersih dan Adil (BERSIH) dan oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah seksyen 4(2)(c) Akta Perhimpunan Aman 2012 yang boleh dihukum di bawah seksyen 4(3) Akta yang sama.

BACKGROUND FACTS

[3] The PAA 2012 legalises a peaceful assembly of citizens in public and makes various provision to facilitate it. However, it criminalises a 'street protest'. On 29 August 2015, a non-governmental organisation called the Coalition for Clean and Fair Elections was allowed to hold an assembly at the Padang Song Kheng Hai in Kuching. The said NGO is also known as BERSIH.

[4] The assembly at Padang Song Kheng Hai proceeded as planned. The police did not object to the assembly at Padang Song Kheng Hai. No one was charged with any offence of participating in the assembly at the said venue.

A However, the organisers of the assembly had asked the public to gather at four points around the city by 2pm before proceeding to the venue at Padang Song Kheng Hai. One of the four points was the Hilton Hotel.

B **[5]** The case for the prosecution was that a large crowd gathered at the Hilton Hotel on the day in question from 1pm onwards. The respondents were among them. The first respondent is the Member of Parliament for Kuching whereas the second respondent is the member of Parliament for Stampin. The first respondent allegedly told PW5 (the Kuching OCPD) outside the Hilton C Hotel that he intended to wait for more participants before making his way to Padang Song Kheng Hai.

[6] The police advised the respondents and others to move to Padang Song Kheng Hai. When the number of people had increased, all those gathered D outside Hilton Hotel walked to Padang Song Kheng Hai. The respondents were in this group. The police were stationed all along the route to the Padang Song Kheng Hai. They took photographs and video clips. The police witnesses testified that at times the group had encroached on to the road instead of keeping themselves on the sidewalk. Some in the group were seen displaying E BERSIH banners prominently. Some were even heard shouting political slogans. They reached Padang Song Kheng Hai around 3pm.

[7] The case of the prosecution that was unfolded by the police witnesses on the ground is that the movement of the people from Hilton Hotel to Padang F Song Kheng Hai constituted a 'street protest' within the meaning of the PAA 2012 notwithstanding the fact that they wanted to participate in the approved BERSIH assembly at the latter venue.

OFFENCE OF STREET PROTEST UNDER THE PAA 2012

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[8] Before proceeding to discuss the decision of the sessions court and the grounds of appeal, for ease of reference, I shall set out the offence creating provision in question and the related definitions under the PAA 2012. Parliament has prohibited a 'street protest' although s 2 of the PAA 2012 states H the object of the legislation is to ensure:

(a) so far as it is appropriate to do so, that all citizens have the right to organise assemblies or to participate in assemblies, peaceably and without arms; and

I (b) that the exercise of the right to organise assemblies or to participate in assemblies, peaceably and without arms, is subject only to restrictions deemed necessary or expedient in a democratic society in the interest of the security of the Federation or any part thereof or public order, including the protection of the rights and freedoms of other persons.

[9] Section 4(1) reads as follow in part:

> The right to organize an assembly or participate in an assembly peaceably and without arms under this Act *shall not extend* to the following:
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> (a)–(b)
>
> (c) a street protest;
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> (d)–(e)
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> (Emphasis added.)

[10] Section 4(2) outlaws a street protest. It reads as follows:

> A person commits *an offence* if —
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> (a)–(b)
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> (c) he *organizes or participates* in a street protest;
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> (d)...
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> (Emphasis added.)

Under sub-s (c), the punishment for the above-mentioned offence is a fine not exceeding ten thousand ringgit.

[11] In s 3 of the PAA 2012, a street protest means:

> an open air assembly which begins with a meeting at a specified place and consists of walking in a mass march or rally for the purpose of objecting to or advancing a particular cause or causes;

Other relevant definitions in s 3 are as follows:

> 'assembly' means an intentional and temporary assembly of a number of persons in a public place, whether or not the assembly is at a particular place or moving;
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> 'participant' means a person intentionally or voluntarily present for the purpose of an assembly;
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> 'public place' means —
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> (a) a road;
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> (b) a place open to or used by the public as of right; or
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> (c) a place for the time being open to or used by the public, whether or not —
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> (i) the place is ordinarily open to or used by the public;
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> (ii) by the express or implied consent of the owner or occupier; or
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> (iii) on payment of money;

(iv) ...

[12] Having regard to the above provisions, the main elements of the offence under s 4(2) are:

(a) that a street protest had taken place; and

(b) that the respondents had either organised it or had participated in it.

In the instant case, the respondents were charged with participating in a street protest.

FINDING OF THE SESSIONS COURT

[13] The learned sessions court judge considered the evidence of the police witnesses who monitored the movement of people from Hilton Hotel to Padang Song Kheng Hai and concluded that it was not a street protest within the meaning of the PAA 2012.

[14] The learned sessions court judge's reasons for finding that the gathering of people in front of Hilton Hotel and their movement to Padang Song Kheng Hai is not a street protest can be briefly stated as follows. He stated that 'intention' is an element of the offence as a street protest means an 'open air assembly'. And an 'open air assembly' refers to 'an intentional and temporary assembly'. He said that only when people intentionally gather at a specified place to march for the purpose of objecting to or advancing any particular cause, it can be said that there is a street protest.

[15] He made a finding of fact that people gathered in front of the Hilton Hotel at 1pm on the said day for the purpose of parking their cars and to avoid traffic congestion on the instruction of the organisers. He found that their purpose was to proceed to Padang Song Kheng Hai for the police approved assembly and that marching on the streets to advance a particular cause was not their purpose. He also found as a fact that the police had ordered the people gathered at the Hilton Hotel to move to Padang Song Kheng Hai and since there were many of them, they had on occasions encroached on to the road. They held banners and flags because they brought those things for the purpose of the assembly at Padang Song Kheng Hai.

[16] The learned sessions court judge also found that the act of the participants in complying with the directions of the organisers or the police for the purpose of participating in an approved event was a 'preparatory act' and that it comes within the object of the PAA 2012 which facilitates a peaceful assembly.

[17] The learned sessions court judge also considered the behaviour of the crowd during their walk to the Padang Song Kheng Hai. He said it was a peaceful march without violence, obstruction or nuisance. He also said the police never ordered them to disperse.

[18] The learned sessions court judge also considered the evidence of a police officer (PW7 ASP Ricky Poh) who said that the first respondent shouted political slogans (*Bersih dan Undur Najib*) at Jalan McDougall. The learned sessions court judge reasoned that since 'Jalan McDougall' is not stated in the charge, the said evidence is outside the scope of the charge. Nonetheless, he did not accept the evidence of PW7 as he found it to be inconsistent with the evidence of photographs and video clips taken at Jalan McDougall. He also said that two other witnesses (PW1 and PW2) did not say that the first respondent shouted political slogans when moving along Jalan McDougall. He also said that the police reports lodged by PW7 the same day did not mention the alleged incident at Jalan McDougall. Furthermore, during cross-examination, PW7 agreed to the suggestion that he was not certain what the first respondent uttered. In fact, he retracted his earlier statement and said that it was the group as whole that uttered the words in question and that it was not the first respondent who had done so.

[19] Finally, the learned sessions court judge opined that even if the movement of the people had become a street protest, the police had duty to disperse it.

[20] In respect of the element of participation, the learned sessions court judge found that the respondents were not 'intentionally and voluntarily present' when the said group of people walked from Hilton Hotel to Padang Song Kheng Hai as the police and the organisers had directed them to move to Padang Song Kheng Hai.

GROUNDS OF APPEAL

[21] In the petition of appeal, the appellant raised numerous grounds of appeal. Most of the grounds pertain to the finding of the sessions court judge that there was no street protest. They can be summarised as follows:

(a) that the sessions court judge gave a narrow interpretation to street protest and marching;

(b) that he was swayed by the fact that it was a peaceful movement of people;

(c) that he wrongly rejected PW7's evidence by saying it was not reflected in photographs and video clips;

A (d) that sessions court judge paid emphasis to the fact that the respondents did not lead the crowd;

(e) that the sessions court judge wrongly linked the offence of participating in a street protest under s 4 of the PAA 2012 to other provisions of the same Act;

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(f) the sessions court judge was guided by the fact that the participants wanted to go the Padang Song Kheng Hai venue by marching on the road and did not consider the meaning of street protest;

C (g) the sessions court did not consider the fact that the respondents intentionally assembled in front of the Hilton Hotel and took a longer route to Padang Song Kheng Hai;

(h) that the sessions court judge did not consider properly the visual images that were presented; and

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(i) that the sessions court judge wrongly applied two authorities that considered the offence of 'unlawful assembly' when this case concerns a street protest.

E ARGUMENTS OF THE APPELLANT

[22] In written submissions and the oral arguments, the learned deputy public prosecutor ('DPP') raised the following points.

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[23] He argued that it was wrong for the sessions court judge to link the procession of the people from Hilton Hotel to Padang Song Kheng Hai to the assembly at the latter venue. He said the movement of people was a street protest and therefore it was not part and parcel of the peaceful assembly at Padang Song Kheng Hai.

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[24] Secondly, the learned DPP also argued that the movement of people from Hilton Hotel to Padang Song Kheng Hai satisfied the all the elements of the definition of a street protest under s 4 of the PAA 2012.

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[25] Thirdly, the learned DPP argued that the sessions court judge wrongly reasoned that a peaceful and orderly movement without an untoward incident would negate the existence of a street protest.

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[26] Fourthly, the learned DPP submitted that the session court judge wrongly accepted the argument of the defence that the failure of the police to take action to disperse the movement of people from Hilton Hotel to Padang Song Kheng Hai is proof that there was no street protest.

[27] Fifthly, the learned DPP submitted that the directive of the police to move from Hilton Hotel to Padang Song Kheng Hai was not an order under s 7(b) of the PAA 2012 as that provision only applied to the lawful assembly at Padang Song Kheng Hai. Section 7(b) of the PAA 2012 provides that participants of an assembly must comply with the orders of the organisers or the police. He said the instant case concerned a street protest which is prohibited by the PAA 2012 and not an approved assembly.

ARGUMENTS ON BEHALF OF THE RESPONDENTS

[28] The main argument of counsel for respondents is that the gathering and movement of people from Hilton Hotel to Padang Song Kheng Hai did not amount to a street protest for the following reasons:

(a) the evidence elicited from the police witnesses particularly PW5 (the Kuching OCPD) was that the police issue a directive to those gathered outside Hilton Hotel to move to Padang Song Kheng Hai;

(b) the organisers of the approved assembly at Padang Song Kheng Hai had also directed those gathered outside Hilton Hotel which included the respondents to move to Padang Song Kheng Hai. The reason behind the gathering outside Hilton Hotel was to manage traffic and ease congestion;

(c) the intent or purpose of the participants in walking from Hilton Hotel to Padang Song Kheng Hai is important. It was to access the venue of the approved assembly. It was not their purpose to object to or to advance any particular cause within the meaning of the definition of 'street protest' under the PAA 2012. Counsel for respondents submitted that the act of the group of people to meet outside Hilton Hotel, park their cars and move to Padang Song Kheng Hai was an act preparatory to another event, ie the approved assembly;

(d) the police did not use their powers to disperse the crowd using their powers under s 21 of the PAA 2012 which they could have done if it was a street protest; and

(e) some of the police witnesses agreed that it would not be a street protest if the participants complied with a police directive to move to Padang Song Kheng Hai.

DECISION

[29] I am mindful that counsel for respondents had submitted that finding of fact is the domain of the trial judge and that the appellate court should not lightly interfere with it. However, it is trite law that an appellate court can interfere with findings of fact if the trial court had wrongly evaluated the facts

A or had asked the wrong questions. It would be otherwise if the finding of fact is based purely on demeanour of witnesses.

[30] The main issue in this case is whether the mass march of people from Hilton Hotel to Padang Song Kheng Hai constituted a 'street protest' within the meaning of PAA 2012. If it did, the follow up question would be whether there was sufficient credible evidence to prove that the respondents had participated in the said street protest. It would not matter a jot whether the respondents had organised the said street protest because participation is an offence.

[31] The main argument of the respondents which appeared to have been wholly accepted by the learned sessions court can be reduced to this. It is not a street protest because the people who had marched to Padang Song Kheng Hai from Hilton Hotel wanted 'to access' the former venue where an approved assembly was about to take place. Thus, they had no intention to partake in a street protest and it was not the purpose of the walk to advance any particular cause either.

[32] In my view, the learned sessions court judge fell into error in ruling that the fact that the participants of the said walk wanted access the Padang Song Kheng Hai venue meant that there could not have been a street protest. The PAA 2012 has provided a definition of what constitutes a street protest. In the premises, if there is credible evidence to support the elements of the statutory definition of a street protest and that there is evidence that the respondents had participated in it, defence should have been called on the said charge.

[33] In the definition of street protest, Parliament did not provide that the dominant purpose or a secondary purpose of a mass march would negate the offence street protest. In other words, the purpose of objecting to or advancing a particular cause may co-exist with another purpose which in this case is accessing the approved assembly venue at Padang Song Kheng Hai. Thus, if from the point of departure to the point of arrival, the intended walk had metamorphosed into a street protest as well within the meaning of the PAA 2012, it is no defence to say that the street protest was not the dominant purpose or the original purpose of the march. Intention is a matter of inference and it is trite law that it can develop on the spot. Otherwise, Parliament's aim in creating the offence of street protest would be completely frustrated.

[34] All these means that the learned sessions court judge should have considered whether the evidence supports the elements of a street protest regardless of whether the participants had also wanted to access the Padang Song Kheng Hai assembly venue. The answers of the police witnesses during cross-examination that there could not have been a street protest merely

because the participants had obeyed their orders to walk to Padang Song Kheng Hai is not relevant either. This is a legal question. Whether or not there was a street protest is a matter for the court to determine upon considering the elements of the offence and the evidence.

[35] The elements that constitutes a 'street protest' in the definition provided by the PAA 2012 are as follows:

(a) an open air assembly;

(b) the participants gathered at a specified place;

(c) they proceeded in mass march or rally; and

(d) for the purpose of objecting to or advancing or a particular cause or causes.

[36] The prosecution tendered unchallenged evidence that the participants numbering over 200 had gathered outside Hilton Hotel from 1pm onwards. According to the police witnesses, these numbers had swelled to 400 later. The learned sessions court judge also mentioned in his judgment that a large group had gathered outside the hotel. He noted that they carried flags and banners. In the premises, there is evidence to support the first two elements in the definition of a street protest.

[37] In respect of the third element, the learned sessions court judge accepted the evidence that the group of people walked from Hilton Hotel to Padang Song Kheng Hai through the routes stated in the charge. The evidence on the point that a large group of people had walked together and even encroached onto the road not only came from the police witnesses but also from the photographs and video clips. In the premises, there is evidence to support the third element of the offence. I should also think that it is unnecessary to enter into a semantic analysis of the meaning of 'marching' ie whether it involves regular steps, rhythmic and measured pace like soldiers' march or walking at own one's own free pace. The focus of the definition is whether a group of people had walked together not whether in what style or fashion they walked.

[38] The fourth element in the definition of street protest is that the mass march must be for the purpose objecting to or advancing a particular cause or causes. I had made reference to this element earlier. The learned sessions court judge said that because the participants wanted to access the Padang Song Kheng Hai assembly venue there was no street protest. However, he should also have considered the following credible evidence that supports the case of the prosecution that the participants wanted to advance the cause of BERSIH while walking towards Padang Song Kheng Hai:

(a) PW5 (the Kuching OCPD) told the court that the crowd started to gather at 1pm outside Hilton Hotel but they did not straightaway walk to Padang Song Kheng Hai. They stayed there until 2pm or later until their numbers swelled to 400. According to PW5, the first respondent refused to leave Hilton Hotel until more people joined the group. Only then, they walked in a group;

(b) in the instant case, the appellate court is not confined to cold print evidence only. The photographs and video clips provide a measure of audio visual advantage as well. The crowd of people had clearly spilled onto the road and had prominently displayed and waved banners, placards and flags that support the cause of BERSIH;

(c) PW7 said political slogans were shouted by the first respondent at Jalan McDougal. Later he backtracked and said that it was the group that shouted slogans. Even so, the question is whether the entire group had converted the walk into a street protest and not whether the first respondent alone had shouted political slogans; and

(d) the police witnesses also testified unchallenged that the crowd took a longer route to the Padang Song Kheng Hai.

[39] In the premises, there is credible circumstantial evidence to support the fourth element.

[40] In respect of the participation of the respondents, in various passages of the judgment, the learned sessions court judge stated that the respondents had walked among the participants to Padang Song Kheng Hai from Hilton Hotel albeit in a peaceful manner without arms and without incident. As pointed out by the learned DPP, whether a mass march is peaceful or not is not relevant for the purpose of definition of a street protest. Therefore, since there is prima facie evidence of the participation of the respondents in the said march, defence should have been called.

[41] I am mindful that the counsel for respondents submitted the defence of mistake of fact which is a *General Exceptions* defence found in the Penal Code. However, at this point there is no evidence in the record to support it. I note that the defence has not even been called. The learned sessions court judge did not address it in his judgment.

[42] In respect of the argument that the police did not disperse the march and therefore it was not a street protest, there is plainly no merit in it. It is an operational matter within their discretion. The only relevant question that should be asked is whether the evidence supports the case of the prosecution that walk to the Padang Song Kheng Hai from Hilton Hotel constituted a street protest and whether the respondents participated in it.

[43] In the instant case, the prosecution had tendered credible evidence in respect of all the elements of the offence under s 4(2)(c) of the PAA 2012 and therefore the sessions court judge should have found that a prima facie case had been established. For the foregoing reasons, I shall allow the appeal and set aside the order of acquittal and order both respondents to enter their defence on the said charge before the same sessions court judge.

Order accordingly.

Reported by Ashok Kumar